EDITOR'S NOTE

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

MAY TERM, 1988

CECIL G. HARRIS,

Petitioner,

VS.

REFINERS TRANSPORT & TERMINAL CORPORATION, and

LOCAL UNION 20, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and

WILLIAM LICHTENWALD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. In a Section 301 action when the plaintiff claims wrongful discharge by the employer, in violation of the Collective Bargaining Agreement, and further the Union with unfair representation is the employer, when moving for Summary Judgment, under a duty under Celotex Corp. v. Catrett, 477 U.S. 317 (1986) to point out that there is an absence of evidence supporting the plaintiff's claim by going further than merely providing the bald, non-specific Affidavit of its local manager that plaintiff was discharged upon plaintiff's "cumulative work record," and to show facts constituting grounds for a discharge, and/or factor showing fair representation?

2. In a wrongful discharge grievance arbitration by a panel of Union and employer members who were both opposed to a particular Union dissident group, does unnecessary mention by the Union Business Representative that the grievant was a member of this Union dissident group, followed by an adverse change in the com-

plexion and attitude of the Union-Employer Panel, constitutes evidence of unfair representation, where there is evidence the Business Representative had been required not to make mention of the grievant's involvement with the union dissident group, and that there were additional evidence of hostility between the Local and Business Representative and the Grievant?

3. In a Section 301 action where the plaintiff offers by sworn Answers to Interrogatories, evidences of hostility by his local Union and Business Representative in that plaintiff had been in a physical altercation with his Business Representative, had "shown his Business Representative up" in winning a prior grievance where the Business Representative had said nothing could be done, had filed various grievances and complaints against his Local and Business Representative, and had been criticized and humiliated by the Business Representative at local meetings, and as a member of a Union dissident group, had asked the Business Representative not to disclose the same to the Union-Employer panel who opposed the dissident group and were

and were arbitrating his discharge grievances, and the Business Representative unnecessarily discloses plaintiff's membership in such dissident group, and thereupon the attitude of the Panel immediately turns against plaintiff, does such evidence constittute

1) unfair representation by the Business Agent and local Union?;

2) A cause for action under the Labor Managemetn Reporting and Disclosure Act?

4. In an action for wrongful discharge claiming violation of the Collective Bargaining Agreement by the employer and violation by the Union of unfair representation in the so-called 301 action, and of violation of the Union of the Landnum-Griffith Act, Article 29, U.S.C. 412 et seq., alleging disloyal treatment by the Union and Business Representative, should the District Court dismiss the action when the Answers to Interrogatories and the Complaint show a valid cause of action; and if not, should the trial court, after dismissal with leave to file anAmended Com-

occuring, allow plaintiff on filing a motion under Rule 59(e) to amend the judgment, and a timely Motion to File an Amended Complaint, vacate any judgments or dismissal and allow the post-judgment motions to file an Amended Complaint and to vacate the prior judgment?

5. In an action under Section 301 for wrongful discharge against the employer for violation of the Collective Bargaining Agreement and against the Union for unfair representation and also against the Union and Business Representative for violation of the Landrum-Griffith Act, Article 29, U.S.C.S. 412, et seq., is a party entitled to a jury trial?

6. In a Section 301 action against the employer for breach of the Collective Bargaining Agreement, and against the Union for unfair representation in the grievance procedure, do the duties upon the Union include:

A. Not to do any act which may to others involved in the grievance decision making process, indicate that the Union and/or any key Union agents are hostile to the grievant;

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B. To know, investigate, and argue, with sincerity, honesty, and reasonable vigor, the basic factual and contractual points and issues supporting and opposing the grievant;

C. To discuss the weak and strong points of the cases of the grievant and employer;

and may a Union be guilty of unfair representation, although there is no evidence of intentional wrong doing?

7. In an action for wrongful discharge against the employer for breach of the Collective Bargaining Agreement, and against the Union for unfair representative and violation of the Landrum-Griffith Act, Title 29, Section 412, et seq., where, after the plaintiff has responded to the employer's Motion for Summary Judgment only by filing Answers to the Union's Interrogatories, and also failed through inadvertance to file an Amended Complaint on the Landrum-Griffith Action, should the trial court render Summary Judgment and dismiss the action, if plaintiff's Complaint and/or his Answers to Interrogatories, show a potential cause and/or causes of action;a nd further, should the trial

court, on plaintiffs' Post Trial Motions under Rule 59(e), 60(b), and for leave to file an Amended Complaint, allow the same where the post-judgment evidentiary filings and the proposed Amended Complaint show proper questions of fact for trial?

8. Is each federal court which has determined that a moving party is entitled to Summary Judgment, under a duty to discuss in substantial detail the evidence offered by the party moved against, so as to show such claimed evidences are merely "conclusory" and do not constitute evidences of material questions of fact properly to be determined by trial?

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REFERENCE TO UNOFFICIAL REPORTS OF DECISIONS BELOW

This Counsel is not aware of any Official Reports of the Decisions by the Courts below.

The Decision and Opinion of the United States Court of Appeals, For the Sixth Circuit, filed December 22, 1987, appears in the Appendix at page 1.

The Decision and Opinion of the United States District Court, Northern District of Ohio, Western Division, which granted Summary Judgment for Defendants on March 31, 1986 appears in the Appendix at page _____. Also in the Appendix at page _____ in the District Court's Opinion and Order of September 5, 1986, by which the District Court overruled Petitioner Harris' Motions for a New Trial; To Alter and Amend the Judgment, under Rule 59(e); a Motion For Leave to File

An Amended Complaint; a Motion to

Vacate the Judgment under Rule 60 (B).

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STATEMENT OF GROUNDS ON WHICH JURISDICTION OF UNITED STATES SUPREME COURT'S INVOKED

Under Rule 21, 1 (e) the Jurisdiction of the Supreme Court is invoked by reason of the Judgment of the United States Court of Appeals for the Sixth Circuit on December 22, 1987; and the timely filing on January 5, 1988 of a Motion for An Extension to January 11, 1988 for filing a Petition for Rehearing, which was timely filed on or before January, 1988. Therefore, on March 1, 1988 the said Sixth Circuit Court of Appeals denied our Petition for Rehearing; and this Appeal is timely filed accordingly on Tuesday, May 31, 1988.

Statutory authority for this Supreme Court to review the said Judgment of the United States Court of Appeals for the Sixth Circuit is found in part in Title 28, Section 1254, Supreme Court - Jurisdiction, which in parts here material reads:

"§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

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STATUTES INVOLVED

Rule 21 .1 (f) this case involves the rights given by the Labor-Management Act, Title 29 USC Section 158 which in parts here beleived to be material reads:

"§158. Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS §157];

(2) to dominate or interfere with the information or administration of any labor organization to contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [29 USCS §156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That

nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later,..."

And as to duties on Labor Organization

Title 29, USCS, Section 158, (b), which

in parts here material reads:

"(b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents --

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 USCS §157]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against

an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Also involved is the Labor Management Reporting and Disclosure Act, Title 29, Section 157, which reads:

"§157. Rights of employees

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refraim from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 USCS §158 (a)(3)].

(July 5, 1953, c. 372, §7, 49 Stat. 452; June 23, 1947, c. 120, Title I, §101 in part, 61 Stat. 140.)"

STATEMENT OF THE CASE

Plaintiff alleges two causes of action - one a Title 29 U.S.C.S. Section 301, action for wrongful discharge by Refiners Transport & Terminal Corporation, hereinafter referred to as "Refiners", and for unfair representation by Local Union No. 20, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as Local 20.

Plaintiff's second cause for action is for violations by Local 20, and Business Representative William Lichtenwald, of the Landrum-Griffin Act, Labor-Management Reporting and Disclosure Act, 29 U.S.C. 401 et seq.; in that these Union Defendants unlawfully denied Mr. Harris the right to speak at Union meetings and to exercise other Federally protected rights in his dealings with Refiners and Teamsters, and, above all, that Local 20, and Lichtenwald, conspired and worked in agreement with Refiners to cause Mr. Harris

a veritable "thorn in their side" to be permanetntly fired, and thus to be expelled as a member; the ultimate discipline. Jurisdiction was claimed in the United States District Court in Toledo, Ohio, where the parties were and Plaintiff was employed, under the Labor-Management Relations Act, Title 29 U.S.C.S., Section 185, under the Labor-Management Reporting and Disclosure Act, Title 29 U.S.C.S. Section 412; and Title 28 U.S.C.S. Section 1337.

Plaintiff in his complaint alleged that Refiners' written instructions, and the U.S. Department of Transportation Rules, required him to stay in constant sight, of the values, intake and other key parts involved in loading and unloading molten sulphur and sulphuric acid - hazardous chemicals - and within 25 feet of the same. Refiners, through their terminal manager Raymond Middleton

repeatedly orally asked Mr. Harris to violate the Refiners' written orders and the Department of Transportation orders, by orally directing Mr. Harris to take his eyes off the crucial and dangerous processes of loading and unloading, and during the same to do "paperword" at the customers places, although these customers themselves gave orders like the Department of Transportation to keep a constant eye on the key and crucial parts like hoses, valves, tanks, and the like. Mr. Middleton was presumably trying to lower Refiners' costs, and thus increase Mr. Middleton's bonus.

Mr. Harris also alleged that Mr. Harris told Mr. Middleton that Mr. Harris would do whatever Mr. Middleton ordered him to do, as long as Mr. Middleton put his orders and instructions in writing. But Mr. Middleton

wouldn't do that. Mr. Harris also alleged and claimed that Refiners and Local 20 wanted him fired, and took steps together to that end, because Mr. Harris stood up for his Union and Contract rights, wanted to be paid for all time worked, not giving Refiners' any "free time" - a point which actually was the decisive key with Mr. Middleton as other drivers would give Refiners some 30 minutes "free" at the end of the work day.

Mr. Harris also alleged that Mr. Harris told Mr. Lichtenwald not to mention at any time during the Grievance Procedure that Mr. Harris was a member of Teamsters for a Democratic Union, an independent organization of Teamster members who criticized National Teamster President Jackie Presser, and Local 20 President Harold Leu; and the Toledo TDU opposed Mr. Leu

in his races every three years to be elected President of Local 20; and Mr. Harris had also filed grievances against Mr. Leu, Local 20, and Business Representative Lichtenwald.

Mr. Harris alleged also that Mr. Lichtenwald, his Business Representative who purportedly was representing him, despite Mr. Harris orders to the contrary, disloyally brought out at the so-called arbitration stage of Mr. Harris discharge grievance in Columbus before the Ohio Joint State Grievance Committee that Mr. Harris was a member of TDU, and Mr. Harris alleged that this changed immediately once the entire complexion of the arbitration hearing, and that immediately once that that TDU disclosure was made, that Mr. Harris "Goose was Cooked" as Mr. Lichtenwald knew ahead of time would happen, and as Mr. Lichtenwald intended. This was the

final and deadly disloyal and hostile act, although there were others.

Both Refiners and Local 20 and Defendant Lichtenwald were charged with proximately causing Mr. Harris' discharge and the resulting losses and humiliation. Refiners claimed Mr. Harris had "stole time" from them, by not filling out various forms while loading and unloading hazardous and dangerous materials.

The Union Defendants filed Interrogatories to the Plaintiff, and Request For Production of Documents, on March 5, 1985, and Plaintiff filed on May 22, 1985 Plaintiff's Answers to Union Interrogatories and Request for Production of Documents.

On January 30, 1985, the Union moved for Partial Summary Judgment as to Defendant William Lichtenwald, in both the 301 Action and the Landrum - Griffin Act violation, and also to

strike the Jury Demand, and this relief was granted on April 8, 1985, despite Plaintiff's Memorandum Opposing the Same. As to the Landrum-Griffin cause of action, Petitioner was given leave to file an Amended Complaint, but although intending to do so, Plaintiff's Counsel failed so to do through oversight.

Within the time allowed, Refiners, alone, moved for Summary Judgment on June 7, 1985. On June 17, Plaintiff's Motion for 60 days to respond to Refiners' Motion for Summary Judgment was granted. Despite intending to prepare a further response, Plaintiff's Counsel overlooked the same, and no further responses were filed before Judgment was ultimately rendered for Defendants-Respondents.

On June 11, 1986 a Notice of Deposition was filed, but Defendants at the scheduled deposition merely had

Plaintiff to identify the various documents which he had brought pursuant to Notice.

Defendant Refiner's Motion for Summary Judgment or, in the alternative, Motion to Dismiss filed June 7, 1985 was based on three grounds:

"1. Plaintiff's Section 301 claims are barred by the statute of limitations applicable to such claims as set forth in the Supreme Court's decision in Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983).

2. Plaintiff's Section 301 allegations fail to state a claim upon which relief can be granted because Plaintiff has failed to adequately allege a breach of the Union's duty of fair representation.

3. Plaintiff's Section 301 allegations fail to state a claim upon which relief can be granted because

Plaintiff has failed to allege exhaustion of internal union remedies or an excuse for failure to do so."

On March 31, 1986 the District Court by Judgment Entry and Opinion and Order, granted Refiners Motion, on Summary Judgment. The District Court ruled that the Action was timely filed on Refiners, citing the Sixth Circuit's ruling in Mason v. Continental Baking Co., 779 F.2d 1166 (6th Cir. 1985), but ruled that in effect the Complaint and Plaintiffs Answers to Interrogatories were insufficient, the District Court stating in part at page 5:

> "The Plaintiff alleges that his membership in the Teamsters for a Democratic Union was brought out during the grievance procedure and as a result Plaintiff was not represented by the union in a fair, loyal and good faith manner. The only support for these allegations are contained in plaintiff's answers to defendant's interrogatories and request to produce documents. Contained therein are plaintiff's conclusory and unsupported statements with

regard to union actions. Upon an examination of the relevant paragraphs of the complaint as well as the remainder of the record, the Court fails to find facts to support plaintiff's allegations that the union acted in a manner which was arbitrary, capricious or in bad faith...."

The District Court then Dismissed the Actions and rendered Judgment for Refiners and Local 20 on March 31, 1986.

Plaintiff then served Defendants on April 10, 1986, and filed on April 11, 1986, his "Motion for New Trial; To Reconsider, Vacate Dismissal, and Reinstate; and Under Rule 59(e) To Alter or Amend Judgment." This Motion was supported by the Affidavit of Mr. Harris together with several enclosures by him.

Thereafter, and within 30 days of the Judgment of Dismissal of March 30, 1986, this Counsel filed on April 30, 1986 a "Motion for Leave to file an Amended Complaint; Vacation of Judgment,

Rule 60 (B); Other Relief," supported by an additional Affidavit from Mr. Harris, an affidavit from Ron Cannon, a Refiners Steward, an Affidavit from Konstantine Petros, a Local 20 Steward then at Roadway Express in Toledo, offering an expert opinion on the adverse and deadly effect of Mr. Lichtenwald's mentioning that Mr. Harris was a member of TDU, and how that would prejudice any chances Mr. Harris had, because the Union and Company members of the Joint State Committee in Columbus would thereby be prejudiced against Mr. Harris, and that such mention of TDU would be a "Kiss of Death" to Mr. Harris grievance, and also the Affidavit of this Counsel as to a conference with Mr. James Warren, Refiners' Steward, who refused to give an Affidavit or statement, and as to certain documents.

Plaintiff-Appellant Harris timely filed a Notice of Appeal on April 30, 1986, and the U.S. Sixth Circuit Court in that Appeal, 86-3396 on August 13, 1986 dismissed the same on the ground that it was premature.

Both the Union and Refiners' filed responses to Plaintiffs' two Motions, and Plaintiff filed reply memorandums. Defendants claimed no cause for action was alleged or shown, no proof of a failure to represent in good faith, and no violation of the Landrum Griffin Act. Plaintiff claimed that his Motion to Amend should have been granted because the only real point offered in opposition was delay, and delay itself was not sufficient, unless Defendants could show real prejudice, and no prejudice was offered by either Defendant. The Trial Court denied all 4 Motions, holding the Preferred Amended Complaint and

and added evendtiary affidavits, did not materially nor substantively add to the prior Complaint nor Answers to Interrogatories. We claim that the District Court was under a duty, even after Summary Judgment, to allow the filing of an Amended Complaint, because it clearly alleged causes for action and also to set aside the Summary Judgments because Petitioner had presented evidences entitling him to a Trial on the merits. All actions, absent perjudice to a party, should be decided on the merits. The defenses offered here are technical, and really nothing more.

Actually, Plaintiff-Appellant Harris had sufficient in the record to withstand the Refiners' Motion for Summary Judgment or to Dismiss. If Plaintiff had filed his additional Affidavits, and Amended Complaint before, the same would have been

considered and allowed. So though filed later they should be treated the same way. The additional time taken of the District Judge does not properly call for a deserving party to be thrown out of Court.

Every attorney at times makes mistakes. Our Courts should give priority to doing Justice. Sanctions could have been put on Petitioner's Counsel. So Justice would have been better served.

The District Court overruled all of Plaintiff's Motions on September 5, 1986, and Plaintiff-Appellant duly filed his Notice of Appeal on October 3, 1986 from the prior Orders and Judgments of March 31, 1986, and September 5, 1986.

The Appeal to the United States Sixth Circuit Court of Appeals was duly processed, and after that Court

of Appeals affirmed on December 22, 1987 the District Court's Judgment, Petitioner timely sought and secured an extension of time for filing a Petition for Rehearing, and duly and timely filed the same. Then on March 1, 1988, the Sixth Circuit Court of Appeals denied Petitioner's Petition for a Rehearing; and now our Petition For a Writ of Certiorari is timely filed on May 31, 1988. In affirming, the Court of Appeals also spoke of Petitioner's "conclusory" allegations and Answers to Interrogatories and Affidavits. In the Appendix herein are copies of the body of the Complaint.

B. FACTS

Inasmuch as each Court below has termed our allegations and evidentiary filings "conclusory", Petitioner here will attempt to refer to specific parts of the Record which bear out our factual claims.

First of all, Petitioner Harris was fired because he followed U.S. Department of Transportation and Refiners' Rules that he should constantly observe the loading and unloading of dangerous molten sulphur and sulphuric acid. Primarily we shall quote from Plaintiffs' Answers to Union Interrogatories, and Request To Produce Documents, filed May 22, 1985, and herein after referred to as "Ans. To Inter.".

Petitioner Harris hauled a lot of Molten Sulphur, which is unloaded at 258° Fahrenheit, (Ans. to Int. P. 3E) and "Ans. To Int. 10, P. 10" reads in parts:

"I have had this Molten Sulphur to catch on fire and ignite from no more than the heat it built up in the unloading line. This has happened to me personally one time. I took steps to prevent this from happening again. Also I have had these trailers to Gusher Molten Sulphur out the top of the trailers loading Dome, when the Loading Dome was opened to unload this product."

"Other drivers have had the unloading hoses just literally blow apart while unloading Molten Sulphur."

Petitioner was instructed, as sworn to in his Ans. To Inter. as follows:

"During my training period when beginning to work for Refiners Transport and Terminal Corp., hereinafter referred to as RTTC, which lasted as I recall 4 days, I was told to stay within reach of the loading and unloading valves, so that in case anything went wrong; everything could be shut down in a minimum amount of time. My Trainer was James Warren. Also I was told by Mr. Warren during this training period that under no circumstances do you sit in the cab of your truck during loading and unloading of your trailer. Not even if it is raining."

"Also: Drivers Pocket Guide to Hazardous Materials, Issued March 1981, Distributed by Refiners Transport and Terminal Corp. "Pages 42 & 43 Article Attending Vehicles."

Text: "A person qualified to attend the vehicle during loading and/or unloading must be: Awake, within 25 feet of the vehicle, with an unobstructed view of it, aware of the nature of the Hazardous Material in question, Instructed in emergency procedures, authorized to and capable of moving the vehicle if necessary."

At page 3c, where Refiners' Terminal Manager verbally ordered Petitioner Harris to violate the rules, but refused to put the verbal order in writing, and this quotation states also the real reason Refiners' discharged Petitioner; and reads:

"The Shippers have signs up on their loading racks, saying that drivers must remain with their trucks during the loading and/or unloading their trucks. Guards at these plants check and see if the drivers are doing what they are supposed to be doing (observing the shippers Safety Rules), also the supervisory personnel of these Shippers are around and watching. The Customers or Receivers of this Molten Sulphur have the same type signs up for unloading Molten Sulphur. The Shipper and Customers or Receivers Safety Precuations, Forbid the Driver to be in the Cab of the tractor, and the instructions and orders of the shippers and customers were, and are, the same as the RTTC's.

"Stay with your truck during loading and unloading." What the Shippers and Customers or Receivers Safety Rules mean and have verbally said, is that I as a Driver must not at any time during Loading and Unloading be in the cab nor may I do any book work during Loading and unloading. Because I am ordered at all time sto be looking at the valves, hose or hoses, dome opening in Tanker, customer or shippers fittings, customers tank gauge or height of customers storage pit and signs of overflow of pit or storage tank. There is no place on top of the truck, nor upon a loading or unloading rack to make out paper work. I told Middleton this. His reply, Quote "Do it in the cab, a shantic, on a fender or in the street" Unquote. I told him, I could not do this, unless he put it in writing. Middleton said he could not do this. I told him, It's unsafe; and I needed protection from the Shipper, Customer or Receiver and from him if anything went wrong during loading and unloading, while I was making out the paperwork. Middleton said he can not put do's and don'ts in writing.

The Shippers and Customers or Receivers would notify the Company (RTTC) if a driver did not stay with his unit, or did not stay in the cab of the tractor or somewhere else; "Stay with his unit." meaning being within reach of the Loading and unloading valves."

Petitioner Harris' Union Steward, Mr.

James Warren and Local 20 knew Petitioner

asked Refiners to put their Instructions in writing, and Petitioner answered Interrogatory 6 on this Point, at page 25:

"ANSWER:

Yes. Notes, written and kept by plaintiff during grievances hearings by Company, Union Local 20 and union Stewart."

The best official citation to the Department of Transportation Rules is from Ques. To Inter. P. 9A:

"(G) Answer:

Code of Federal Regulations
Transportation
Title 49
Parts 100 to 177
Revised as of October 1, 1982
Chapter 1 Research and Special,
Programs,
Programs Administration,
Department of Transportation.
(Parts 100-177)
Editorial Note: For a document which shows editorial changes and corrections in this chapter, see 35 FR 13835, September 1, 1970.
Subpart B - Loading & Unloading
177.834 General Requirements
Title 94
Title 46 Article 33 Shipping."

Petitioner by standing up for true Unionism as he saw it, suffered from hostile

and discriminatory practice by Refiners', Local 20, and Business Representative Lichtenwald, for varying reasons, including a physical attack on Lichtenwald in December, 1982; filing of Grievances against Lichtenwald, Local 20, and Petitioner's continued insistence that Local 20 and Refiners abide by the Collective Bargaining Agreement. Petitioner was a member of Teamsters for a Democratic dissident group which in Ohio opposed Teamsters President Presser and Local 20 President Harold Leu, when Petitioner's Grievances came on for hearing at the realistic final arbitration stage, before the Ohio Joint State Grievance Committee, Business Representative Lichtenwald, maliciously to assure Petitioner Harris would be discharged, although Mr. Harris had asked Business Representative Lichtenwald not to do it, mentioned Mr. Harris was a member of

TDU. Since TDU is unpopular with the Teamsters and Employers both, Mr. Harris "Goose was Cooked", and under the circumstances Local 20 and Business Representative could have done nothing as lethal and hostile to Mr. Harris than to mention this because TDU was an anathema to Teamsters and Employers. This in part is brought out by Petitioner's Answer to Union Interrogatory No. 9, which at Page 44 reads:

> "Interrogatory No. 9: With reference to the allegations contained in ¶ No. 10 of the Plaintiff's Complaint that, "At the hearing, Defendant Lichtenwald, knowing that his actions would contribute to Plaintiff being fired, deliberately and knowlingly brought out that Plaintiff had been a member of the Teamsters for a Democratic Union. Immediately, the complection (sic) of the hearing changed, it was then obvious that Plaintiff would be discharged," state:
>
> True. Because he basically and wholeheartedly did not want to represent me in this case or any other case I might be involved in. This statement could be corroberated by other drivers of R.T.T.C., Matlack Corp. and Coastal Tank Lines; because of Lichtenwald's

hostile behavior and attitude toward me during general monthly held Union meetings. These people would have to be forced to come forward to testify. For they (other employee's and union local 20 members) are in fear of retaliation by the Union and their respective employers and causing them to lose their jobs."

And at Page 44A:

"Ron Cannon Union Stewart for Terminal 11 began speaking about what the Co. (RTTC) had been doing and why. I raised my hand and got the floor and I told Cannon that he did not know what he was talking about. Then I gave my explanation of Refiners parent Co. Leaseway's size and told him and everyone else that was their way Leaseway did during the Wage Concession Meetings and Votes and Cannon called me a liar. This statement infuriated me totally and a small Altercation started. Lichtenwald got involved in it when someone grabbed me from behind. I did not know who it was and down he went. I don't know what took place from the time that I was grabbed from behind nor do I know how long (amount of time) this Altercation lasted. But within 2 1/2 months from this meeting and altercation, all the trouble started with the paperwork, work habits and check in and fueling of the truck. Up until this time nothing was ever said if there really was anything wrong."

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And at Page 44B:

> "I filed grievances or rebuttals on all of their Kevin & Raymond's) actions and possibly the earliest that the Union acted on this was September 16, 1983. Lichtenwald displayed his intentional direct contempt and disloyalty to me as a Loyal Teamster, Dues Paying and in good standing. Lichtenwald also displayed his unwillingness to Nip the Co's. harrassment of me in the Bud. In my personal opinion, he just played along and along and along and never had any intentions of stopping the co. (RTTC) from harrassing me. (Cecil Harris). Thus relating to the co's. (RTTC) ability to possibly discharge me, as did take place January 5 and January 10, 1984. Also this behavior by Lichtenwald was in my best opinion a Direct Retalliation to the Altercation at Royal Inn Motel December 19, 1982 and my involvement with T.D.U."

There was no occassion for Business Representative Lichtenwald to bring out Mr. Harris involvement with TDU, as shown by Ans. To. Inter. at page 61:

> "Mr. Lichtenwald's disinterest, unconcerned attitude toward handling of my grievances at the local level. Also I personally requested of him not to read the

grievance in Columbus containing my T.D.U. membership. I even asked Mr. Warren to ask Mr. Lictenwald not to read it, because Mr. Warren and Mr. Lichtenwald are good friends. But it made no difference. There were plenty of other grievances on the same thing that he could have read. Just like Mr. Warren told me, Quote "I think they determine these grievances before we even get into the hearing." Unquote: Notes dated 12/13/83."

And at page 67:

"In 1983 some months before my un-called for discharge on or about January 5, 1984 Lichtenwald would even bring up my membership in T.D.U. in Regular Monthly union meetings, to bring up embarrassment and humilitation of me in front of members of the union. On several occassions both in the latter half of 1982, and also in 1983, I told Lichtenwald to keep my T.D.U. Membership out of Local 20's meetings. I told Mr. Lichtenwald because I don't bring T.D.U. in here (Meaning Local 20 Union Hall) so I don't expect you (Lichtenwald) to bring it in. What organizations I belong to is my business and not the business of Teamsters or RTTC. the only reason that I mentioned my T.D.U. membership in the grievance to start with was that RTTC and Union Local 20 already knew that I was handing out TDU Literature and I was just confirming their beliefs.

Also practically none of the grievances that I had filed with Teamsters Local 20 during my 11 years involvement with

RTTC have never been completely heard fully. 99% Ninety Nine Percent were written in the last 2 years I was there at RTTC. So I don't believe that I could beconsidered a long time troublemaker or whatever. I was only trying to get the Union to uphold the Text of our Contract between RTTC and Local 20 and the Local Union was fighting me all the way. The very fact that practically none of these grievances were properly and fully heard substantiates this fact."

And at page 67A:

"Local 20 and Lichtenwald in 1982, 1982, and 1984, knowingly concealed from me information on Okuly's Grievance, which the Union's Chicago Tribunal Committee had ordered in 1982 Local 20 and Lichtenwald to give to me.

I, also filed grievances against James Warren, (1) Un-Union Like Behavior, which the Local 20 Executive Board White Washed down the drawin supposedly for lack of evidence. The evidence was there but he Warren was Lichtenwald's hand picked, (Not Voted in by employees of Terminal 91), Union Steward for our barn (Terminal). I filed against Warren & Lichtenwald for hand-picking Warren."

And at page 67B:

"I filed negligence charges against the Co. as well as Local 20 and Lichtenwald in these grievances."

And at page 67C:

"(A fellow driver, of RTTC was discharged by R.T.T.C. (fired because he just stopped in to say Hi, to some

the Office Employees, and he had a can of beer in his hands, he was definitely off duty at the time and the co. fired him. I asked Lichtenwald what he and the Union was going to do to get the man's job back, Lichtenwald replied, "their's not any thing I or the Union can do, about it. I told Lichtenwald that in no way should their man not be reinstrated. The man was not on duty at the time and that all the co. should of done was tell him, to please not come on the property with alcholol. The man did get his job back, but if I would of not, (as saying, goes) stuck my nose in, Lichtenwald and the Union would of sold a man right down the river, they wouldn't of even fought for him."

And at page 67D:

"The Union and the Co. figures me to be a trouble maker, by fighting for what I believe is right, for myself and for anybody else who is being done wrong, by. Even though I told the man I didn't like him, I would help to keep him from being unjustly and unfaithfully dealth with by Union and Co. then they the co. (RTTC). If you do not play ball with the Union and Co. then they work together to get rid of you. This is fact.)"

Responsent and Local 20 will claim that Terminal Manager's Affidavit, attached to Refiners' Motion for

Summary Judgment, shows Petitioner Harris was discharged for "cumulative work record", but there are no factual and evidentiary materials showing any vilations of the collective Bargaining Agreement. This is a farce and smokescreen. Petitioner Harris was fired because he abided by the Department of Transportation Rules for Safety, and because Mr. Harris wouldn't give Refiners' 1/2 hour of :free time" a day as did some of the other drivers.

Attached to Petitioner Harris' Motion for a New Trial, served within the required 10 days, was a Copy of the Ohio Bureau of Employment Services, filings, which shows that the Argument over "Free Time" was the real reason for firing, as Refiners' claimed that Mr. Harris would claim the time from when he pulled into a customers place until

he pulled out, but Refiners' claimed he wasn't entitled to all that extra time he took for doing the "Paperwork" which "Paperwork" should have been done while unloading or unloading. -- the same old controversy.

No where is there any reference in the filings by Refiners and Local 20 that Mr. Harris truned in any false filings. Mr. harris claimed Mr. Lichtenwald did not represent him fairly because Mr. Lichtenwald did not get the Refiners' records, "work sheets, drivers logs, tachograph, although Mr. Harris requested them, Aff. 9 nor that often drivers will be late for 10 minutes which is the amount of time which MR. Harris lost for Refiners;" which was stated on Page 8 of the memorandum for Petitioner's MOtion for a New Trial, filed April 11, and served, April

10, 1986. The first attachment to that Motio nfor a New Trial, etc., was an OBES "Examiner's Fact Finding Report" which reads:

> "EXAMINER'S FACT FINDING REPORT
>
> Theft and Dishonesty. January 25, 1984
>
> Refiners Transport and Terminal Corporation terminated Mr. Cecil G. Harris due to Theft and Dishonesty in connection with his employment there. The theft and dishonesty act we terminated him for was for turning in more time worked then he actually did. By accepting his paychecks, it falls under the Theft and Dishonesty of the Companys Union Contract.
>
> Raymond S. Middleton (s) (?)

Petitioner Harris had a very creditable record of saving Refiners "Big Money," when he could, including helping a Refiner's unimportant customer save a load of molten sulphur, December 24, 1983, 12 days before he was fired January 5, 1984, when Coulton Chemical Foreman Wilson, as stated in Answer to Inter. P. 3F:

> Wilson asked me to help them to keep from losing the whole trailer load of Molten Sulphur on the ground. I told Wilson one second. I shut down what I was doing and I ran to Trimmer and corrected his and Wilson's problem right away. Set truck up to unload properly, and helped Trimmer clean up the mess. Wilson wrote on Trimmers Way-Bills in the Demurrage Spot that

Also Coulton Chemical Corp. Supervisor Bob on the evening of January 24, 1983 advised me of a problem they were having with R.T.T.C. and after making 2 phone calls to RTTC Personnell and no answer, I went to the extreme and called the President of RTTC at his home. Shortly thereafter the RTTC Drivers were back on the job and Coulton Chemicals problems were solved.

I have kept more than one driver out of trouble with this product. I have been asked more than once by the Company (RTTC) to unload a Moten Sulphur trailer that no one else could get unloaded. Why? Evidently because my knowledge of the product and trailer was better than the other drivers. There is a lot of danger being imposed on anyone to be asked to unload a Molten Sulphur trailer that will not unload under normal conditions. I was the only person around when I would open one of these trailers under these conditions.

I guess, you could say that I have saved the company from probably having to buy 6 new sulphur trailers. Because if this product ever completely solidifies in the trailer it would be almost impossible to remelt it into a liquid. Because all of the heating coils are in the bottom of teh trailer. They are not wrapped up around the sides as a railroad tank car is. Thus requiring the Company (RTTC) to buy another new trailer.

The Ohio Rider to the Central States Area Tank Truck Agreement, attached to Refiners' Motion for Summary Judgment, provided in parts:

Article 21
Safety

Article 21 shall be supplemented as follows:

Article 23
Paid for Time

Section 23.2 Call-in time shall be amended as follows:

Employees called to work shall be allowed sufficient time, without pay, to get to the garage or terminal, and shall draw full pay from the time ordered to report and register in. If not put to work, employees shall be guaranteed six (6) hours' pay at the hourly rate specified in this agreement. If an employee is put to work, he shall be guaranteed eight (8) hours' pay.

Attached to Petitioner Harris' Motion for Leave to File Amended Complaint, etc., filed April 30, 1986, in Petitioner's Affidavit, which at Page 9 reads in part:

EVIDENCE OF MR. LICHTENWALD"S BAD FAITH IN KNOWING ABOUT, BUT FAILING TO MENTION THAT AT JANUARY 10, 1984 COLUMBUS HEARING, REFINERS FAILURE TO PAY MR. HARRIS FOR TIME WORKED IN ACCORDANCE WITH THE COLUMBUS JOINT COMMITTEE'S RULING OF OCTOBER 4, 1983, ARTICLE 23

On October 4, 1983, a number of grievances of Mr. Harris were heard by the Ohio State Joint State Committee which ruled that Mr. Harris was to be paid for all time worked. Previously, Refiners had refused to pay him this time, because Mr. Harris' had exceeded Company policy time. The matter was taken up with Mr. Middleton and he said he would pay it in two weeks.

Refiners and Local 20 in the Court of Appeals made numerous reference to the so-called minutes of the Ohio Joint State Grievance Committee hearing of January 10, 1984,

Harris Grievance; but, there is no required identification, authentication, nor evidentiary statement that the said so-called "Minutes" were a true, accurate, nor fair statement of what transpired at that Hearing, and Petitioner denies the same.

Therefore, the above-mentioned "Minutes" of the Ohio Joint State Grievance Committee were not legal evidence nor properly to be considered by any court herein.

For clarity, we state that Petitioner's only evidentiary filing, before Summary Judgement, was his Plaintiff's Answer to Union Interrogatories, and Request to Produce Documents, filed May 22, 1985.

Thereafter, and after the Summary Judgment of March 31, 1986, Petitioner Harris attached Affidavits to his Motion for a New Trial, etc., timely filed on April 11, 1986, and Motion for Leave to File an Amended Complaint; etc., filed April 30, 1986, which 2 filings included 2 Affidavits of Petitioner Harris, one of their counlse, an Affidavit of former Refiners Steward Ronald D. Cannon, an affidavit of Konstantine Petros, a TDU member that to mention that Mr. Harris was a member of "TDU" would be a "kiss of

death" to both Union and Employer Panel Member of the Ohio Joint State Grievance Committee. At Page 7 of Plaintiff's Motion for a New Trial, etc., Memorandum on a bit of evidence of Unfair Representation by Local 20.

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ARGUMENT

I. IN A COMPLAINT INCLUDING SECTION 30] ACTION, AND ALLEGATION OF A VIOLATION OF THE LANDRUM GRIFFITH ACT, AND UNFAIR REPRESENTATION AGAINST THE UNION, FOR WRONGFUL DISCHARGE, AN EMPLOYER, MOVING FOR SUMMARY JUDGMENT, MUST GO FURTHER UNDER CELOTEX CORP. V. CATRETT, 477 U.S. 317, THAN TO PROVIDE A BOLD, NON-SPECIFIC, AFFIDAVIT CLAIMING GROUNDS FOR DISCHARGE FOR "CUMMULATIVE WORK RECORD;" AND FAILURE SO TO DO, DOES NOT PLACE THE BURDEN OF PROOF ON THE PLAINTIFF EMPLOYEE.

After this case was on Appeal, the Opinion was announced by this Court in Celotex Corp. v. Catrett, 4]7 U.S. (1986). In the Celotex Corp case, Supra, Chief Justice Rehnquist stated, as given in 91 L. ed. 2d 265 at page 275:

> "Instead, as we have explained, the burden on the moving party may be discharged by "showing"—that is, pointing out to the

District Court—that there is an absence of evidence to support the nonmoving party's case."

In our case, Refiners, through Mr. Raymond Middleton's Affidavit, supported their motion for Summary Judgement only by the relevant statement, which reads:

4. On January 5, 1984 Refiners discharged employee Cecil Harris from his position as truck driver on the basis of his cumulative work record which included twelve (12) violations of the Uniform Rules during the previous nine (9) month period. Such discharge was not violative of the labor agreements referenced in No. 3, above. In conjunction with the discharge, a discharge hearing was also held with representatives of Teamsters Local Union No. 20 on January 5, 1984.

There are no facts given describing nor proving the Violations.

As shown previously, the real reasons for the Discharge are not spelled out.

We respectfully claim that this Court should make clear that the Employer should be required to spell out in meaningful

detail the facts constituting the Violation claimed to constitute a dischargeable offense, which in the real world is like "Capital Punishment" on a worker's employment record.

So, here there was no evidences showing Fair Representation by the Union.

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II. IN AN ACTION FOR WRONGFUL DISCHARGE, AGAINST THE EMPLOYER AND AGAINST THE UNION FOR UNFAIR REPRESENTATION AND BREACH OF THE LANDRUM GRIFFITH ACTION, TITLE 29, SECTION 412, ONCE THE EMPLOYER SHOWS EVIDENCES OF HOSTILITY AND DISLOYALTY BY THE LOCAL AND BUSINESS REPRESENTATION AGAINST HIM, THE COURT SHOULD FIND THE SAME TO BE EVIDENCE OF UNFAIR REPRESENTATION AGAINST THE UNION.

We claim Petitioner Harris produced evidence that he was wrongfully discharged because Mr. Harris stood up for safety; 2) Mr. Harris demanded pay for all time worked, and would not give Refiners any "free time" nor was Mr. Harris in violation of the Collection Bargaining Agreement; 3) that Mr. Harris was not discharged for any proven violation of the Labor Contract; and 4) Mr. Harris was fired because Refiners and Local 20 wanted to get rid of Mr. Harris because he was a Teamster for a Democratic Union dissident, who was a "thorn in the side" of Refiners and Local 20.

In support that our evidence constituted evidence of Unfair Representation we cite Cunningham v. Erie Railroad

Company, 358 F.2d 640, (CA 1966).

III. IN ACTIONS BASED UPON SECTION 301 AND THE LANDRUM GRIFFITH ACT, A PARTY IS ENTITLED TO A JURY TRIAL.

There is a conflict in the circuits on this issue.

The best reasoned decision is Quinn v. Digiulian, 739 F.2d 637 (CA D.C., 1984).

IV. A PARTY IN DEFENDING AGAINST A MOTION FOR SUMMARY JUDGEMENT IS ENTITLED TO THE BENEFIT OF ALL FACTS AND CLAIMS CONTAINED IN THE PARTY'S FILINGS.

The leading case is Sherman v. Hallbauer, 455 F.2d 1236, (CA 5, 1972).

V. After the Trial Court has granted Summary Judgement and dismissed the Case, A Party by timely motion memoranda and Affidavits, submitting a Proposed Amended Complaint and Affidavits, is entitled to a Vacation of the Prior Judgement, if the facts and claims in such Post Judgement filings, extablish material issues to be determined by Trial. Firstly, we cite Foman v. Davis, 371 U.S. 178; and Hurin v. Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California, 648 F.2d 1252 (CA9, 1981).

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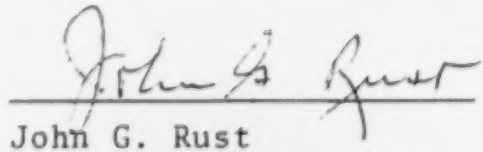
CONCLUSION

There is a need for this Honorable Court to declare the Law on the many issues in this case.

This Counsel has well selected the evidences available.

This Counsel would honor the Opportunity to appear before this distinguished Court, and would turn out a Brief in keeping with the high scholarly traditions of this Court.

Respectfully submitted,



John G. Rust
Counsel for Petitioner

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JURISDICTION IN U.S. DISTRICT COURT

Jurisdiction in the United States District Court is granted by the Labor Management Act, Title 29, Section 185, which in part reads:

> "§185. Suits by and against labor organizations
>
> (a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Jurisdiction is also granted by the Labor Management Reporting and Disclosure Act, Title 29, Section 411 et seq., which in parts material here reads:

> "§412. Civil action for infringement of rights; jurisdiction
>
> Any person whose rights secured by the provisions of this title [29 USCS §§411 et seq.] have been in-

fringed by any violation of this title [29 USCS §§411 et seq.] may bring a civil action in a district court ofthe United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

(Sept. 14, 1959, P.L. 86-257, Title I, § 102, 73 Stat. 523.)"

also relevant here is Title 28, Section

1337 which reads:

"§1337. Commerce and anti-trust regulations

the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

June 25, 1948, c. 646, 62 Stat. 931."

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Certificate of Service

Three copies of this Petition have been served by U.S. Mail, First Class, Postage Paid, to Attorney Robert N. House, Counsel for Refiners, and to Attorney Jeffrey Julius, Counsel for the Union Respondents this May 31, 1988.

John G. Rust

Counsel for Petitioner

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